or upon a criminal revision unless so ordered by the High Court. There are circumstances in which certain applications can be made in appeals by motion in which case it would be proper to file affidavits in support of the motion, but in my opinion affidavits are not receivable as part of the proceedings in an appeal except in support of a specific motion.

In view of these considerations and of the clear statement on the record that the three courses open to the appellant had been put to her I did not allow the affidavits to be read, and this ground of appeal was, therefore, disallowed.

Another ground of appeal was that the learned Magistrate appeared to have assumed that a statement from the dock was not sufficient proof for the purposes of rebutting the presumption arising under section 11 of the Common Gaming Houses Ordinance. Mr. Lim Kheng Kooi for the appellant cited the case of *Rex v. Kwek Kim Chuan*[3], a report of which appears in *Braddell on Common Gaming Houses*, 2nd edition, page 169. In the course of his judgment in that case Fisher, J. said:—

"It was urged for the Crown that proof can only mean evidence, and evidence in the legal sense of sworn testimony — and that as none of the accused gave evidence on oath but simply made statements there is no proof here at all. . . . . .

It seems to me that I must consider their recorded statements (which are of course recorded for a purpose), and give such weight to them as they appear to me to carry. They appear to me (there are only two) to be quite sufficient to rebut the presumption raised by the section, and to prove that this was a private party and that the place where it was held was not a common gaming house at all; and the whole circumstances of the case strongly corroborate this view."

It appears that in that case there were circumstances corroborating the accused's statement but except where there is corroboration it seems to me that there can be very few cases in which a statement made by the accused from the dock, which cannot be tested by cross-examination, can by itself amount to proof of anything. Such a statement may, it is true, raise a reasonable doubt in favour of the accused and may thus result in parts of the prosecution case not being proved, but in my view it would have to be a very convincing statement before it could, by itself, rebut a presumption of law. It is to be observed that in section 3 of the Evidence Ordinance it is provided that a fact is said to be proved when after considering the *matters* before it the Court believes it to exist, and I think there is no doubt that a statement by the accused is one of the matters before the Court, although it may not be, strictly speaking, evidence. It would appear, therefore, that the Court must at least take it into consideration.

However this may be, it is clear to me that the weight to be attached to a statement from the dock is essentially a matter for the trial Magistrate and as it is clear from his grounds of judgment that he took the statement into consideration I am of opinion that there is no substance in this ground of appeal.

Coming back, then, to the first ground of appeal, as the basis of the decision of the learned Magistrate was the presumption under section 11 and as possession was not proved I had no alternative but to allow the the appeal on this ground and to quash the conviction.

Appeal allowed.

Counsel for appellant: *Lim Kheng Kooi.*

Re SYED ALWI ALKAFF, DECD.; ALKAFF v. ALKAFF & ORS.

[O. C. J. (Brown, J.) March 17, 1954]

[Singapore — Originating Summons No. 255 of 1953]

Will — Specific devise — Subsequent settlement of same property — Powers of revocation and new appointment in settlement — Effect of Wills Ordinance, ss. 18 & 19.

By his will dated 27th August 1924 the Testator gave five houses described as Nos. 86, 87, 88, 89 and 90 Robinson Road to his Executor to hold upon various trusts of a charitable nature. By a Settlement dated 14th April 1925 he conveyed the same five houses to Trustees to hold upon trust for himself for life, and thereafter upon various charitable trusts which were different from those contained in the Will. In the Settlement he reserved for himself the power "at any time thereafter by . . . will or codicil expressly referring to . . . the property subject (to the Settlement)", to revoke the trusts contained in the Settlement and to declare new trusts "for the benefit of himself, . . . his heirs executors or administrators or of any other person or persons". The Settlor died on 29th August 1926 without either having revoked his said will or having made any further Will in exercise of the power of revocation and appointment contained in the Settlement.

The Trustee of the Will of the Testator applied to Court by way of Originating Summons to determine whether upon the death of the Testator, and having regard to the provisions of either Section 18 or Section 19 of the Wills Ordinance, the trusts of the Will were to be given effect to, or whether the property was to be held upon the trusts set out in the Settlement.

Held: (1) if the Settlement had not expressly required the Will to revoke the trusts of the Settlement before making a new appointment of the trust property, the specific devise of the property in the previous Will would have operated by virtue of Section 19 of the Wills Ordinance as a valid exercise of the subsequently created general power of appointment. (Airey v. Bower[1] and Patch v. Shore[2] followed); (2) in the present case, however, before any new appointment could be made the trusts of the Settlement had to be revoked by the Will, and the Court had to be satisfied that the Will evidenced an intention to exercise that power of revocation. Notwithstanding Section 19 of the Wills Ordinance, no such intention could be imputed in the present case: Section 19 only applies in the absence of a contrary intention appearing on the face of the Will and the fact that the Will was dated prior to the Settlement which created the power of revocation was itself sufficient in the present

case to rebut the presumption that the Will was intended to operate in such a manner as to exercise the power of revocation contained in the Settlement. (Re Wells[4] and Re Hayes[5] followed and applied); (3) but since the execution of the Settlement did not have the effect of revoking the Will, and since the Testator continued, after the date of the Settlement to have power to dispose of the Settled property by his Will, the effect of Section 18 of the Wills Ordinance was that on the death of the Testator the trusts of the Will prevailed over the trusts of the Settlement, and were now to be given effect to. (Dicta in Airey v. Bower[1] followed and applied.)

Cases referred to:—

(1) *Airey v. Bower* 12 App. Cas. 263.

(2) *Patch v. Shore* 62 E.R. 743; 2 Dr. & Sm. 599; (1862) W.R. 142; 7 L.T. 544; 32 L.J. Ch. 190.

(3) *Stillman v. Weedon* 60 E.R. 782.

(4) *Re Wells* 42 Ch. D. 646.

(5) *Re Hayes* (1900) 2 Ch. 332.

(6) *Saxton v. Saxton* 13 Ch. D. 359.

ORIGINATING SUMMONS brought by the plaintiff, the trustee of the Will dated 27th August 1924 of the testator, Syed Alwi Alkaff, to determine whether certain property, which had been specifically devised by his Will and had afterwards, in the testator's life-time been conveyed to the defendants as trustees by way of Settlement to be held upon trusts different from those contained in the Will, was in the circumstances which had arisen, to be held upon the trusts of the Will, or upon trusts of the Settlement.

T. E. Atkinson for the plaintiff, trustee of the testator's Will (representing the interests of all persons interested under the trusts of the Will).

R. H. Green for the defendants, the trustees of the testator's Settlement (representing the interests of all persons interested under the trusts of the Settlement).

Cur. Adv. Vult.

Brown, J. : —By his will dated the 27th day of April 1924 (the 26th day of Moharam 1343 in the Muslim Calendar) the testator devised certain specific property comprising all the houses Nos. 86, 87, 88, 89 and 00 Robinson Road, Singapore. By subsequent Settlement dated the 14th of April 1925 he conveyed this property to trustees upon trust to convert the "trust premises" into money and hold the money upon certain trusts. The beneficiaries under the devise contained in the Will are different from the beneficiaries of the trusts contained in the subsequent Settlement. At the end of the Settlement there appears the following proviso :—

"Provided always and it is hereby agreed and declared that it shall be lawful for the Settlor at any time or times hereafter by any deed or deeds revocable or irrevocable or by will or codicil expressly referring to this power or the property subject thereto wholly or partially to revoke and make void the uses trusts powers and provisions herein declared and contained of and concerning the premises hereby settled and to declare such new or other uses and trusts of and concerning the same or any part or parts thereof as he may think fit for the benefit of himself the Settlor his heirs executors or administrators or of any other person or persons."

Here, then, we have a testator who, eight months after making his Will, makes a Settlement containing trusts which are at variance with the Will, reserving to himself a power to revoke the trusts of the Settlement and then a power of appointment for the benefit of himself or anybody else, which power is exercisable by will or codicil provided that such will or codicil expressly refers to the property which is the subject of the power contained in the Settlement.

Mr. Green, in support of the trusts of the Settlement, took the point that the reference to the Robinson Road property in the Will is not a sufficient reference to satisfy the proviso in the Settlement. His argument was that throughout the Settlement until we come to the proviso, the term used is "trust premises", and that the use of a different term in the proviso, *viz.* "or the property subject thereto," requires a special meaning to be given to it which is something other than the "trust premises." But the whole of the Settlement is concerned with the property which is contained in the first Schedule, which includes the Robinson Road property. The properties in the first Schedule are set out by name. And I think that the reason for not using the term "trust premises" in the proviso is that that term would limit the properties to those which are named and set out in the first Schedule; but if the trustees sold those properties and purchased other properties the settlor wanted those other properties to be covered by the proviso.

The question which I have to determine is whether a will which contains a specific devise can operate as the exercise of a power of appointment contained in a subsequent settlement, where the settlor has power to revoke the trusts of the settlement and then to appoint himself again; or whether in such a case an express intention to revoke the trusts of the settlement and to exercise the power must be shewn. In other words, in the absence of an expressed intention do the trusts of the will prevail over the trusts of the subsequent settlement?

By section 19 of the Wills Ordinance (Cap. 53) every will is to be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the testator's death, unless a contrary intention shall appear by the will. By section 21 of the

Ordinance a general devise includes property over which the testator has a general power of appointment. In the present case we are concerned with a specific devise, and it is common ground that section 21 has no application. Another reason why section 21 cannot apply to this case is that by the proviso to the Settlement the power is only exercisable by an instrument "expressly referring to the power or the property subject thereto." This is therefore not a general power "to appoint in any manner he may think proper" which would fall with section 21; and Mr. Green argues that as section 21 does not apply none of the provisions of the Wills Ordinance applies and the law which is applicable is the law before the Wills Ordinance was passed. Support for this argument is to be found in foot-note (l) at page 810 of *Jarman (8th Edition)*, where the learned author says: "the better opinion is that section 24 (our section 19) does not apply to any powers of appointment except those coming within section 27 (our section 21)."

I have had the advantage of full and careful arguments by learned Counsel in which all the relevant authorities since the Wills Act was enacted have been examined, and I propose to begin my consideration of the effect of our section 19 with the case of *Airey v. Bower*[1]. There the testatrix had a general power of appointment over property A. In 1854 she made a will which contained a residuary bequest of her estate to X. By deed in 1855 she appointed the A. property upon such trusts as she by deed or her last will "should from time to time or at any time thereafter direct or appoint," and in default of appointment in trust for Y. The word "thereafter" is to be noted, having regard to the word "hereafter" which appears in the proviso to the Settlement in the present case. This was a general devise. It was held to fall both within sections 27 and 24 of the Wills Act (which correspond with sections 21 and 19 of our Ordinance) and the will operated as an exercise of the power reserved by the subsequent deed and passed the property to X and not to Y. Lord Macnaghten said (at page 270): "the effect of the 24th section of the Will Act (section 19 of our Ordinance) is to give every will a continuing operation and to make it speak immediately from the death of the testator." This case, then, establishes firstly that in the case of a general devise a will operates as an execution of a general power of appointment contained in a subsequent instrument; secondly, that this result is brought about by the operation of sections 19 and 21 of our Wills Ordinance.

The next step is to consider whether the same result occurs where the will contains a specific devise, as in the present case. In support of the proposition that it does Mr. Atkinson relies on the case of *Patch v. Shore*[2], and in particular upon the following passage which appears at the beginning of the Vice-Chancellor's considered Judgment at page 747, (which I think sufficiently sets out the relevant facts):—

> "By the indenture of the 15th of February 1860, John Shore reserved to himself a power to appoint by will. He had previously, in 1855, made his will, and I must hold that the specific bequest in the will, although the will was made previously to the execution of the deed creating the power of appointment, nevertheless operated as a due execution of the power."

The report of the case in Vol. 62 of the English Reports is that which is contained in *2 Dr. & Sm. 599*. The case is also reported in 1862 W.R. 142; 7 L.T. 554; 32 L.J. Ch. 190; and it is curious that only the report in *2 Dr. & Sm.* contains the above passage. But it must, I think, be taken as authority for the proposition that, as in the case of a general devise (*Airey's*[1] case) so in the case of a specific devise, a general power of appointment which is created by an instrument made after the will is validly exercised by the will (though the will was prior in date.) This result cannot have been brought about by the operation of section 21 of the Wills Ordinance (which only deals with general devises). It must be due to the operation of section 19 alone.

But *Patch v. Shore*[2] is not on all fours with the present case, because in that case the subsequent instrument contained no power of revocation such as is contained in the proviso to the Settlement which I am considering. It contained a general power of appointment which would have brought the case within our section 21 if the devise, instead of being a specific devise, had been a general devise. But in the present case the Settlor, after creating the trusts of the Settlement, has limited his power to revoke them by an instrument which is expressly required to refer to "the power or the property subject thereto," and then has reserved to himself the power to declare new trusts as he may think fit without limitation or restriction. He has shewn no express intention to revoke the trusts of the Settlement or to declare new ones. Is this a general power of appointment, as was the case in *Airey v. Bower*[1] and *Patch v. Shore*[2]? Or does the power of revocation take this case out of the "general power" line of cases and require an expressed intention to exercise the power of revocation? Does section 19 of the Wills Ordinance apply so as to make the will prevail over the subsequent settlement, notwithstanding the power of revocation? Or does the power of revocation make the case analogous to those cases where there is a special power of appointment which can only be exercised in favour of certain specified persons or classes? And if the latter, is the effect to

exclude the operation of section 19 of the Wills Ordinance, or ought I to follow the decision in *Stillman v. Weedon*[3] where a previous will was held to exercise a subsequent special power of appointment?

It is at this point that I find myself in the position of having to break new ground. That a devise in a will, whether general or specific, operates as an execution of a general power of appointment contained in a subsequent instrument is, I think, covered by the authority of *Airey v. Bower*[1] and *Patch v. Shore*[2]. That an express intention to exercise the power must be shown where the power which is contained in a subsequent instrument is a special power limiting its exercise to certain persons or classes and imposing on the donee the duty of exercising a discretion to select the persons in whose favour the power is to be exercised is, I think, covered by the authority of *Re Wells*[4] and *Re Hayes*[5], notwithstanding the earlier decision of *Stillman v. Weedon*[3]. But no authority exists upon the question of whether a power of revocation operates upon an otherwise general power of appointment so as to place it in the category of a special power.

The essence of Mr. Atkinson's argument that, notwithstanding the power of revocation, this is a general power of appointment falling within *Airey v. Bower*[1] and *Patch v. Shore*[2] is that in this case the testator-settlor has in effect retained full control of his property throughout. For this reason he says that the case does not fall within the category of *Re Wells*[4] or *Re Hayes*[5], where the power was a limited power of selection, which imposed upon the donee the duty of exercising a discretion in regard to whom he should select. But that was not the only reason for those two decisions, as I read the authorities. The question in both cases, as I understand them, was whether an intention to exercise, by a prior will, a power of appointment contained in a subsequent instrument could be inferred. In *Hayes' case*[5] the will was made by a different person to the person who made the subsequent instrument, and it was held that no legal presumption of intention arose. And in *Wells' case*[4] one of the grounds of decision turned upon the date of the will. If the will had been subsequent to the deed-poll in that case Stirling J. would have been prepared to infer an intention to exercise the power of revocation and new appointment which the deed-poll contained. But because the will was prior in date to the deed-poll no such inference could arise. That is the conclusion which he reaches at the bottom of page 655; and it is an entirely different point to the point regarding the limited, selective, and discretionary nature of the power which he then proceeds to consider.

Section 19 only raises a presumption that the will is to speak and take effect as if it had been executed immediately before the death of the testator. The important words are "unless a contrary intention shall appear in the will." Thus, I think, that the Court is required to endeavour to ascertain the testator's intention, and only if it is satisfied that no contrary intention appears in the will is the section to be applied. In considering whether a contrary intention appears in the will it appears to me that I am bound to consider the date of the will, as Stirling J. did in *Wells' case*[4]. In the present case the testator created the trusts of the settlement eight months after the date of will; and in order that he should exercise his power to declare new or other trusts he had first to revoke the trusts of the settlement in the manner prescribed in the proviso. He did not do so. I base my opinion that section 19 does not apply in this case upon the date of the will. It seems to me that the date of the will shews that the testator intended that the trusts of the settlement which he made so shortly after, should prevail. And I think that the decision in *Re Wells*[4] was founded as much upon the testator's intention as shewn by the date of the will as upon the limited nature of the power. It seems to me that the following passage from the Judgment of Stirling J. at page 657 is directly in point in the present case :—

"The question, it is to be borne in mind, is whether the testator has shewn an intention not merely to appoint the fund, but also to revoke an appointment actually made. Apart from the section of the Wills Act, no such intention could be inferred where the will bears a date prior to that of the instrument which reserves the power of revocation. Section 24 (our Section 19) provides that "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." That is a very different thing from saying that the will is for all purposes to speak and take effect as if it had been executed immediately before the death of the testator. The question is one of intention, and of intention to undo what has been done; and, for the purpose of ascertaining the intention, I am entitled to look, not merely at the part of the will which immediately deals with the subject-matter, but also at any other part of the instrument, including the date; and the date appears to me to show decisively that no intention to undo what was only done at a subsequent time can be attributed to the testator, and that his language is to be ascribed to a totally different cause. In my judgment the terms of the section are not such as to compel me to impute to the testator an intention which manifestly never existed in fact."

But Mr. Atkinson further contends that the Will must prevail over the Settlement by reason of the operation of section 18 of our Wills Ordinance. Here again there is no direct authority, but the point was raised in *Airey v. Bower*[1] without being decided. Section 18 reads as follows :—

"No conveyance or other act made or done subsequently to the execution of a will or relating to any real or personal estate therein comprised, except an act by

which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

Applying that section to the facts of this case we find:—

(i) A settlement, made subsequently to the date of the will and relating to the Robinson Road property which is comprised in the will, which conveys the property to trustees upon certain trusts;

(ii) The settlement does not revoke the will;

(iii) The proviso to the settlement leaves the testator with power to dispose of the property by will at time of his death.

Then how can the case which I am considering escape the operation of section 18? *Theobold,* in the 10th Edition at page 129, appears to consider that the effect of this section is merely to cover the *Saxton v. Saxton*[6] class of case, where a testator at the time of making his will held the leasehold of property which he devised and after the date of the will purchased the freehold; and it was held that the devise operated to include the freehold. But in what way can the section avoid being applied to the present case except by importing into it words which it does not contain? And that is what Mr. Green, who robustly contends that the strong expressions of opinion of all the Law Lords in *Airey's*[1] *case* are incorrect, says that I must do. He says that the section must be read as if it said: "..... shall prevent the operation of the will *according to the intention of the testator* ....." He sees a distinction between section 18 on the one hand and sections 19 and 21 on the other in that the former is negative ("shall prevent") and the latter are positive (shall be construed.") Section 18, he says, does not render nugatory the subsequent "conveyance or other act," but merely stops it from preventing the operation of the will in accordance with the testator's intention with respect to what is left. He gives as an example the case of A who devises property to B, and by a subsequent Settlement conveys the property to C and D as trustees in trust for B, reserving to himself a general power of appointment. Thus at the date of the will the freehold is vested in A, but at the date of his death it is vested in the trustees, though A still has a general power of appointment over it. He says that section 18 does not prevent the operation of the devise on what is left, namely the power of appointment. But the inescapable distinction between section 18 on the one hand and sections 19 and 21 on the other is that in the latter two sections the Court is required to consider the testator's intention, but not the former. Section 18 is, in my opinion, clear and unambiguous. The absence of any reference to intention makes it all the stronger by comparison with sections 19 and 21. And the words which Mr. Green would have me import into section 18 would remove the distinction between that section and sections 19 and 21. In construing section 18 I hold that the testator's intention is immaterial, and I consider that I am bound by the wording of the section. The effect of section 18 is that the trusts of the will must prevail over the trusts of the settlement.

Solicitors for the plaintiff: *Allen & Gledhill.*

Solicitors for the defendants: *Braddell Bros.*

In re NG KIM KANG, DECD.; TAN JOOI KHIM (f) v. NG JOOI THONG & ORS.

[O. C. J. (Wilson, J.) March 22, 1954]

[K. L. — Originating Summons No. 132 of 1953]

Will — Interpretation of — Implied life interest under discretion given to one trustee in will — Court's intervention therefrom.

By his will the deceased appointed the applicant (his wife) and the respondents to be his trustees. The main questions to be considered were: (1) whether by the terms of the will, there was an implied condition that the applicant was to receive only a life interest liable to be divested on distribution; and (2) whether the Court could intervene with the discretion given to the applicant under clause 9 of the said will which read as follows:

"I direct that the maintenance of my wife and family, the marriage, educational and other expenses of my children shall be paid out of my estate at the sole discretion of my wife the said Tan Jooi Khim."

Held: (1) as the property was declared to be distributed at a date which might well be, and in fact was, before the death of the applicant there was no implication that she should take only a life interest; (2) clause 9 of the will could not be regarded as having given the applicant an uncontrollable or irresponsible discretion and therefore the Court could intervene being bound to consider the interests of the beneficiaries other than the applicant.

Cases referred to:—

(1) *Blackwell v. Bull* (1836), 1 Keen 176; 48 E.R. 274.

(2) *Ralf v. Carrick* 5 Ch. D. 984.

(3) *Costabadie v. Costabadie* (1847), 6 Hare 410; 67 E.R. 1225.

(4) *In re Charteris, Charteris v. Biddulph* (1917) 2 Ch. 379.

(5) *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571.

(6) *In re Hodges, Davey v. Ward* (1878), 7 Ch. D. 754.